

DECISION



17070
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

[Protest Alleging Improper Rejection of Bid]

FILE: B-200928

DATE: February 19, 1981

MATTER OF: Lutz Superdyne, Inc.

DIGEST:

1. Agency rejection of "equal" product submitted under Brand Name or Equal clause on ground product was not equal because offered item failed to meet salient feature was improper where salient characteristic was not stated in solicitation as required by regulation and GAO decisions.
2. Although offeror was improperly rejected, there is no basis for GAO to object to award to other offeror during pendency of protest because of exigency of procurement or to recommend remedial action because performance has been completed.

Lutz Superdyne, Inc. (Lutz), protests the award of a contract to Brown & Sharpe Manufacturing Company (Brown) under solicitation No. FTP-BT-101324-N-9-8-80, issued by the General Services Administration (GSA). Lutz essentially contends that its bid sample submitted in response to a brand name or equal solicitation was improperly rejected.

The solicitation for calipers was a negotiated procurement under the public exigency exception to formal advertising. Federal Procurement Regulations (FPR) § 1-3.202 (1964 ed. amend. 192). The brand name specified in the solicitation was Brown's part No. 599-579-2 or equal. The solicitation required offerors providing other than the Brown product specified to submit a bid sample. Lutz offered the product of Mitutoyo Manufacturing Company and submitted a bid sample. Based on its evaluation of this product, GSA rejected this alternative product as not equal to the brand name model. GSA determined that the caliper Lutz offered was not equal to the brand name product on the basis that its depth probe was wider than the one on the brand name model. Lutz protests this determination.

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In its report to this Office, GSA concedes that the protester's product was improperly rejected as the rejection was not consistent with applicable procurement regulations and decisions of the Comptroller General.

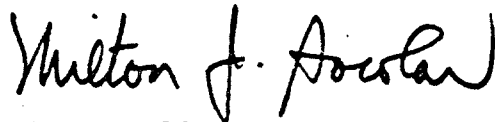
The solicitation's Brand name or Equal clause provided that bids offering equal products would be considered for award if the Government determined that the alternative met the salient features listed in the solicitation. The subject solicitation did not state any specified dimensional requirement for the caliper's depth probe, other than that the item be suitable for inside, outside, and depth measurement. GSA indicates that the depth probe dimensions are material because a thinner probe permits a greater degree of flexibility in the size of holes and geometric shapes which can be measured by the caliper. GSA's basis for rejecting the model offered by Lutz was that it was wider than Brown's caliper, not useful in measuring small holes, and thus not "equal" to the brand name product.

GSA acknowledges that while the products may not have been equal in the dimensions of the probe, this apparently essential characteristic of a depth probe of specific dimensions was not explicitly stated as a salient characteristic and, therefore, could not be a proper basis for rejection. We agree. See General Services Administration Procurement Regulation § 5A-1.307-7 (1980); FPR § 1-1.307-4 (1964 ed. amend. 139); Air Plastics, Inc., 59 Comp. Gen. ____ (B-199307, August 22, 1980), 80-2 CPD 141. Rather than rejecting Lutz' offer, the proper course of action would have been to correct the defective negotiated procurement by amending the solicitation to state the depth probe requirement as a salient characteristic under FPR § 1-3.805-1(d) (1964 ed. amend 153), giving all offerors an opportunity to make offers on an equal basis.

The protest is sustained.

While it is regrettable that Lutz' offer was improperly rejected, because of the exigency of the procurement there is no basis for our Office to object to award to the next lowest acceptable offeror during the pendency of the protest or to recommend remedial action as the contract has been completed.

Finally, GSA advises that it has apprised all appropriate procurement officials of the deficiency in this procurement so that action will be taken to prevent such improper rejections in the future. Accordingly, no further action by this Office is required.

A handwritten signature in dark ink, appearing to read "Milton J. Arosan". The signature is written in a cursive, flowing style.

For the Comptroller General
of the United States